

Not Reported in N.E.2d, 1992 WL 366895 (Ohio App. 11 Dist.)

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CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Eleventh District, Portage County.

STATE of Ohio, Plaintiff-Appellee,
v.
William FRY, Defendant-Appellant.

No. 92-P-0049.
Dec. 11, 1992.

Criminal Appeal from the Court of Common Pleas, Case No. 89 CR 0023. Affirmed.
[David W. Norris](#), County Prosecutor, Atty. Eugene L. Muldowney, Asst. Prosecutor, Ravenna, for plaintiff-appellee.

Paul Croushore, Columbus, for defendant-appellant.

Before [FORD](#), P.J., and [CHRISTLEY](#) and [JOSEPH E. MAHONEY](#), JJ.

OPINION

[CHRISTLEY](#), Judge.

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_____ (Cite as: 1992 WL 366895, *1 (Ohio App. 11 Dist.)) _____

Appellant, William Fry, is appealing the April 22, 1992 judgment entry dismissing appellant's petition to vacate and set aside his conviction pursuant to [R.C. 2953.21](#). The basis of his petition was ineffective assistance of counsel.

Initially, appellant was indicted on four counts of rape, [R.C. 2907.02\(A\)\(1\)](#) and one count of corruption of a minor, [R.C. 2907.04\(A\) and \(B\)](#).

After a negotiated plea agreement, the prosecution agreed not to prosecute four of the counts if he pled guilty to one count of rape. The prosecution and appellant's attorney filed a written summary of [Crim. R. 11\(F\)](#) negotiations.

On May 25, 1989, appellant entered a written plea of guilty to one count of rape of a victim under thirteen years of age. Prior to questioning, the prosecutor stated, in the record, that there was a minimum actual incarceration of five years and that it was a nonprobationable offense. Before accepting the plea, the trial court questioned appellant. The trial judge asked appellant if he understood the charges. Appellant responded affirmatively. Appellant also indicated that he understood the plea bargain agreement. Appellant also further indicated that as an aggravated felony of the first degree that it carried a maximum penalty of twenty-five years in prison. Then the trial court specifically asked appellant:

"And you understand it's nonprobationable. You will be sentenced to the penitentiary today?"

Appellant nodded affirmatively.

The trial court also asked if appellant's attorney had advised him of his various constitutional rights regarding a jury trial. Appellant responded affirmatively and that he understood them. Appellant further indicated that he was waiving his rights to a jury trial, to confront the witnesses, and his right to have his lawyer cross-examine those witnesses. The trial court specifically enumerated all of appellant's rights. Each time appellant indicated that he was waiving his constitutional rights including his right to an appeal.

Appellant affirmatively responded that he understood the plea bargain. He indicated that no one had made any other promises to him or made any threat that would cause him to enter the plea bargain. Then appellant stated that he was pleading guilty, and a written plea of guilty was entered.

Thereafter, appellant was sentenced eight to twenty-five years.

On November 29, 1990, appellant, *pro se*, attempted to file a delayed appeal. This court dismissed the appeal for failure to comply with [App. R. 5\(A\)](#), [App. R. 3\(C\)](#) and Loc. R. IV.

On October 11, 1991, appellant filed a motion through his trial attorney, to be placed on probation. Although the motion merely requested the trial court to reconsider its former sentencing order, and place appellant on probation, the motion was silent as to what authority the request was being made. Generally, probation is granted to a convicted person *prior* to the commencement of the sentence and then only for a probationable offense. [R.C. 2951.02](#) *et seq.*

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That motion was subsequently denied by the trial court on November 25, 1991.

On March 27, 1992, appellant, *pro se*, filed a series of documents with the court: a petition to vacate and set aside the conviction pursuant to [R.C. 2953.21](#); motion to proceed in forma pauperis and affidavit of indigence; motion for appointment of counsel; motion to attend the evidentiary hearing; a brief in support along with appellant's attached affidavit and various other exhibits.

Without a hearing, the trial court dismissed the petition to vacate and set aside on April 22, 1992.

On May 13, 1992, appellant timely appealed the April 22, 1992 judgment entry, and now raises one assignment of error.

"The trial court erred when it failed to conduct an evidentiary hearing on petitioner's motion to vacate and set aside his conviction but instead based its ruling on the record and pleadings."

Although appellant alleges only one assignment of error, he divides it into two issues. In his first issue, appellant alleges that the trial court erred in failing to conduct an evidentiary hearing on petitioner's motion to vacate and set aside his conviction but instead based its ruling on the record and pleadings. Specifically, he contends the trial court could not properly determine merely by examining the record whether trial counsel for appellant had been deficient when it is alleged that counsel told appellant that he would receive shock probation.

Appellant relies on [State v. Milanovich \(1975\), 42 Ohio St.2d 46, 49](#), which held a post-conviction petition raising an issue which on its face raises a constitutional issue which cannot be determined by examination of the files and records a hearing shall be granted. The petitioner's allegation in *Milanovich* was that his guilty plea was induced by counsel's promise that "shock

parole” would be granted if petitioner entered a guilty plea. A guilty plea induced by promises or threats is not a voluntary act, and is voidable. *Id.* at 49, citing [Machibroda v. United States \(1962\)](#), 368 U.S. 487, 493. Since the petition raised a claim which was sufficient on its face to raise a constitutional issue, and the files and records of the case did not affirmatively disprove the allegation, the court determined that it was error for the trial court to dismiss the petition without a hearing. *Milanovich* at 50.

Since the passage of the Criminal Rules, in particular [Crim R. 11](#), the holding in *Milanovich* is somewhat diluted.^{FN1} The Ohio Supreme Court has since held that a petition alleging ineffective assistance of counsel, coercion and breach of a plea bargain agreement may be dismissed without hearing where the record indicates compliance with [Crim. R. 11](#) and petitioner fails to submit evidentiary documents containing sufficient operative facts as to his claims. [State v. Kapper \(1983\)](#), 5 Ohio St.3d 36.

[Crim. R. 11](#), which now governs plea bargains, requires a trial court to personally inform the defendant of his rights and the consequences of his plea and to determine if the plea is understandably and voluntarily made. *Kapper* at 38. Where a petitioner asserts ineffective assistance of counsel, the petitioner bears the initial burden of submitting evidentiary documents containing sufficient operative facts to demonstrate the lack of competent counsel. *Kapper* at 38, citing [State v. Jackson \(1980\)](#), 64 Ohio St.2d 107. The court concluded in *Kapper* that:

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“ * * * a petition for post-conviction relief is subject to dismissal without a hearing when the record, including the dialogue conducted between the court and the defendant pursuant to [Crim R. 11](#), indicates that the petitioner is not entitled to relief and that the petitioner failed to submit evidentiary documents containing sufficient operative facts to demonstrate that the guilty plea was coerced or induced by false promises.” *Id.* at 38.

The *Kapper* court also stated that a petitioner's own self-serving declarations or affidavits alleging coerced guilty pleas are insufficient to rebut the record on review which shows that his plea was voluntary. See, also, [State v. Poland \(1984\)](#), 16 Ohio App.3d 303. In order to require an evidentiary hearing, a petitioner needs to submit something such as a letter or affidavit from the court, prosecutors or defense counsel alleging a defect in the plea. [State v. Fuller \(1990\)](#), 64 Ohio App.3d 349, 354.

This court, in [State v. DiMeolo \(Sept. 30, 1992\)](#), [Ashtabula App. No. 91-A-1680](#), unreported at 8, determined before a trial court is required to hold a hearing, a petitioner must submit evidentiary documents containing sufficient operative facts to demonstrate the lack of competent counsel as well as prejudice. This court went on to say that:

“When a ‘ * * * petitioner is requesting a hearing on matters *dehors* the record, of which he has specific knowledge, * * * (i)t is only reasonable to require him to set forth, in his petition and accompanying affidavits and supporting materials, sufficient operative facts to satisfy his initial burden of proof * * * .’” *DiMeolo*, at 8, quoting *Jackson*, at 111-112.

See, also, [State v. Nieves \(Dec. 14, 1990\)](#), [Lake App. No. 90-L-14-003](#), unreported.

When applying the above to the present case, it becomes clear that the trial court did not err in dismissing appellant's petition without a hearing. Appellant did attach his affidavit in which he stated that:

“5.) Craig Stephens [appellant's trial attorney] told me that if I would plead guilty, that I would get shock probation after six (6) months of prison time.”

It has been held that a petitioner's own self-serving declarations are not sufficient to rebut a record that demonstrates that a plea was voluntary. A review of the record below indicates that appellant's plea was voluntary. At the hearing where appellant entered his guilty plea to one count of rape, *both* the prosecutor and the trial judge indicated that this was a nonprobationable offense. Appellant indicated to the judge that he understood the offense was nonprobationable. Appellant further told the court he understood the charges and the plea bargain agreement as well as his constitutional rights. Appellant further indicated at that hearing no one had made any other promises to him nor had anyone threatened him. The [Crim R. 11](#) written summary of negotiations clearly stated that in exchange for appellant's guilty plea, the state would move *nolle prosequi* the remaining counts. It also said the state would recommend that appellant be sentenced to no less than eight to twenty-five years in prison, and that the minimum sentence be actual incarceration as a matter of law. Appellant affirmatively stated he understood the plea bargain. Thus, the record before the trial court indicated that appellant's guilty plea was voluntary.

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Appellant offered no other evidence to support his allegations such a letter or affidavit from the judge, his attorney or the prosecution. Therefore, the trial court did not err in dismissing the petition without a hearing. The first issue is without merit.

The second issue raised by appellant is that the trial court erred in ruling that appellant's trial counsel was effective by merely examining the record when appellant alleged that counsel did not consult with his client and failed to actively defend him.

In more basic terms, appellant is arguing that he received ineffective assistance of counsel. Both the Ohio Supreme Court and this court have adopted a test to determine whether an accused has received ineffective assistance of counsel:

“First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *DiMeolo* at 7-8, quoting [Strickland v. Washington \(1984\)](#), 466 U.S. 668; [State v. Post \(1987\)](#), 32 Ohio St.3d 380, 388.

Thus, an appellant must “submit evidentiary documents containing sufficient operative facts to demonstrate the lack of competent counsel and also that the defense was prejudiced by counsel's ineffectiveness.” *DiMeolo* at 8, quoting *Jackson* at 111. This court has concluded that if a petitioner is requesting a hearing on matters not in the record, he must set forth, in his petition and accompanying affidavits and supporting materials, sufficient operative facts to satisfy his initial burden of proof. General conclusionary statements are not deemed sufficient to warrant a hearing *DiMeolo* at 8.

In a factual scenario very similar to the present case, *DiMeolo* asserted in his brief and affidavit that his counsel was ineffective for various reasons: he failed to investigate the facts of his case; he failed to consult; he failed to interview witnesses; he failed to advise him that he was ineligible for probation; he waived his rights to a preliminary hearing without his consent; he failed to attempt to suppress his statements to police; and, he failed to request the trial judge to withdraw.

As in the present case, *DiMeolo* alleged that when his trial counsel advised him to plead guilty, counsel told him that there could be jail time, but *DiMeolo* would be eligible for probation. Likewise, *DiMeolo* alleged that trial counsel advised him to tell the judge that no deals were promised. *DiMeolo* at 9.

From the logic set forth in the first issue, this court concluded in *DiMeolo* that the petitioner was not entitled to a hearing when his affidavit was all he provided to contradict his statements made at the plea proceedings.

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We are operating under almost identical facts in the present case. The only evidence appellant has to support his claim of ineffective assistance of counsel is his own self-serving affidavit while his own testimony at the plea proceeding contradicts his affidavit. Therefore, based on *DiMeolo*, appellant's second issue is also without merit.

The entire first assignment of error is without merit. The judgment of the trial court is affirmed.

[FORD](#), P.J., and [JOSEPH E. MAHONEY](#), J., concur.

[FN1](#). Although *Milanovich* was considered by the Supreme Court after the adoption of [Crim. R. 11](#), the underlying trial court proceeding occurred prior to [Crim. R. 11](#)'s effective date. *Milanovich* pleaded guilty on January 18, 1972 while [Crim. R. 11](#) did not become effective until July 1, 1973. Thus, *Milanovich* was not subject to [Crim. R. 11](#) analysis. See, [State v. DiMeolo \(Sept. 30, 1992\) Ashtabula App. No. 91-A-1680](#), unreported at 10; [State v. Kapper \(1983\)](#), 5 Ohio St.3d 36, 37-38.

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